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thousands of membership organizations, charities, advocacy organizations, and other tax exempt nonprofit organizations would be unnecessarily interrupted or impeded.

### **Background**

Over ten years ago the Commission promulgated rules under the Telephone Consumer Protection Act of 1991 (the "TCPA" or "Act") to protect consumers from unsolicited telemarketing calls as well as from unsolicited facsimile advertisements.<sup>2</sup> The Act prohibits certain communications, including the use of any telephone facsimile machine, computer, or other device, to send unsolicited advertisements to telephone facsimile machines.<sup>3</sup> In 1992 the Commission adopted rules implementing the TCPA, including a rule prohibiting the transmission of unsolicited advertisements by facsimile machines.<sup>4</sup> An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."<sup>5</sup>

The Commission noted in its 1992 Order that there would be an exception made to this rule where an established business relationship existed prior to the unsolicited facsimile

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<sup>2</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-728, Report and Order, FCC 03-153, para. 2 (2003) ("2003 TCPA Order").

<sup>3</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 104 Stat. 2394 (1991), Section 2(5), reprinted in 7 FCC Rcd 2736 at 2744.

<sup>4</sup> 47 C.F.R. § 64.1200(a)(3)

<sup>5</sup> 47 C.F.R. § 64.1200(f)(5)

transmission.<sup>6</sup> In a Memorandum Opinion and Order released by the Commission on August 7, 1995, communications made on behalf of tax exempt nonprofit organizations were exempted from the TCPA rules.

In the following years, the marketplace for telemarketing has grown.<sup>7</sup> On December 18, 2002, in response to Congress' concern for consumers, the Federal Trade Commission adopted a national "Do-Not-Call" registry to be maintained by the federal government to protect consumers from unwanted telephone calls.<sup>8</sup> In consideration of such actions, the Commission also reviewed its rules in reference to the TCPA and was persuaded by consumer advocates who urged the Commission to take tougher measures to stop unwanted facsimiles.

On June 26, 2003, the Commission declared that an established business relationship is no longer sufficient to show express permission and that *all* unsolicited facsimile transmissions to any person must be preceded by the person's prior written express invitation or permission to receive unsolicited facsimiles.<sup>9</sup> The Commission specifically stated that "[b]usinesses may obtain such written permission through direct mail, websites, or during interaction with customers in their stores."<sup>10</sup> But with respect to facsimile transmissions, the Commission did not substantively address the special situations of tax exempt nonprofit organizations (other than to

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<sup>6</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992), 7 FCC Rcd at 8779, para 54, n.87.

<sup>7</sup> 2003 TCPA Order, para. 8.

<sup>8</sup> Telemarketing Sales Rule, Final Rule, Federal Trade Commission, 68 Fed. Reg. 4580 (Jan. 29, 2003).

<sup>9</sup> 2003 TCPA Order, para. 189

<sup>10</sup> 2003 TCPA Order, Appendix B, para. 37

declare that listing of members' facsimile numbers in the directory of a trade association does not constitute the requisite approval). If the Commission were to determine that these unsolicited facsimile rules apply to *all* entities with no exceptions, effectively revoking the Commission's previously granted established business relationship exception that the tax exempt nonprofit organization had relied upon for a decade, that community would be profoundly damaged. This is because a large amount of their activity in pursuit of tax exempt nonprofit purposes is through communications to members, donors, and other constituents using facsimile transmissions that the constituents have implicitly, but not explicitly, requested.

Tax exempt nonprofit organizations comprise a discrete and unique class of entities in the United States. Nonprofit corporation status is granted by states under their nonprofit corporation laws to organizations that generally do not issue equity stock and do not seek commercial profit on behalf of shareholders. Federal income tax exempt status is granted by the Internal Revenue Service to organizations that are organized on a nonprofit basis, do not share revenues with individuals, and meet extensive IRS requirements in numerous categories.

Tax exempt nonprofit organizations include, among many others: trade associations, professional societies, and chambers of commerce; agricultural organizations; advocacy and social welfare organizations; charitable, educational, scientific, religious, and amateur sports organizations. ASAE estimates that the number of these organizations exceeds half a million.

All tax exempt nonprofit organizations have established, legitimate constituencies with whom the organizations routinely communicate, often via facsimile transmission. The constituents might be dues-paying members, present or former donors, or other who have voluntarily associated themselves with the special tax exempt nonprofit missions of these organizations.

It is on behalf of these tax exempt nonprofit organizations, in their unsolicited facsimile communications with their constituencies, that ASAE seeks emergency clarification of the Commission's recent rule.

### **Discussion**

Members of the tax exempt nonprofit community are deeply concerned and confused about the Commission's potential blanket application to them of the prohibition on unsolicited facsimile advertisements. ASAE contends that the Commission's rules prohibiting unsolicited facsimile advertisements set forth in Section XIII of its Report and Order misinterpret the definition of "unsolicited advertisement" and the scope of its application under the TCPA. There simply is no statutory basis for so broadly applying the TCPA's prohibition on unsolicited facsimile advertisements to any tax exempt nonprofit organization facsimile transmission that involves the marketing, promotion, and/or sale of goods and services.

The TCPA defines the term "unsolicited advertisement" as "any material advertising the *commercial availability or quality* of any property, goods, or services which is transmitted to any *person* without that person's prior express invitation or permission" (emphasis added). On the basis of this definition, the TCPA provides that:

"It shall be unlawful for any person within the United States--

. . .

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; . . .".

The Commission, however, erroneously bases its rulemaking for implementing the prohibition on unsolicited facsimile advertisements on a fundamental misreading of the statutory definition of "unsolicited advertisement." The statute does not prohibit all unsolicited facsimile

advertisement, just those transmissions advertising the *commercial availability or quality* of property, goods, or services (emphasis added).

Indeed, if one accepts the view that the unsolicited facsimile transmission of any advertisement for the promotion, marketing, or sale of property, goods, or services of any kind is prohibited by the “unsolicited advertisement” definition, it begs the question: If Congress intended to legislate a total prohibition against sending unsolicited facsimile advertisements, why then did Congress not draft the “unsolicited advertisement” definition to read: “any material advertising the ~~commercial~~-availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission” or simply “any material advertising ~~the commercial availability or quality~~ of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission”? Clearly use by Congress of the adjective “commercial” has meaning and is intended to qualify and narrow the statutory definition of “unsolicited advertisement.”<sup>11</sup>

The statutory prohibition on “unsolicited advertisements” depends on the content of the unsolicited advertisement transmitted. According to the statutory definition, to be subject to the prohibition, an unsolicited facsimile advertisement must “contain material advertising the *commercial availability or quality* of any property, goods, or services. . .” (emphasis added). By the use of the qualifying language – *commercial availability or quality* - Congress plainly sought to provide for a narrow definition and to limit the application of the “unsolicited advertisement”

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<sup>11</sup> The Commission’s “Do-Not-Call” rules specifically address application to nonprofit organizations but the unsolicited facsimile advertising rules do not reference nonprofit organizations, apparently because the different rules rely on different underlying statutory definitions – one, the broad “telephone solicitation” definition, and two, the narrowly tailored “unsolicited advertisement” definition.

prohibition.

Analyzing the plain language of the statutory definition – *commercial availability or quality* – leads to the conclusion that a prohibited unsolicited advertisement, by definition, must be motivated by a commercial purpose or interest. Therefore, according to the TCPA’s definition of “unsolicited advertisement,” if such advertised property, goods, or services were being offered via unsolicited facsimile transmission by an organization in pursuit of its tax exempt and nonprofit purposes then such activity – by definition - should not be considered “commercial.”

Any analysis of whether an advertisement has the required commercial purpose, and would therefore be prohibited, must primarily examine the rationale for the activity, not simply whether the mechanics of the activity involve the purchase or sale of property, goods, or services or exchange of consideration. It is well established, indeed embedded, in both federal and state law that tax exempt nonprofit organizations are organized and operated to conduct their activities in ways fundamentally different from the ways in which taxable for-profit businesses conduct their activities. For example, each state’s statutory framework treats tax exempt nonprofit organizations differently, if not entirely separately, from the treatment of for-profit, taxable, equity-owned businesses. Likewise, the Internal Revenue Code treats tax exempt organizations differently from taxable entities and relies on an entirely separate and distinct section of the law to do so. Indeed, with one exception, the word *commercial* does not even appear in the federal statutory law regulating tax exempt organizations.<sup>12</sup>

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<sup>12</sup> Internal Revenue Code, Section 501(m).

Moreover, the Internal Revenue Code and IRS regulations provide separate treatment to commercial-type business activities of tax exempt nonprofit organizations. When such an organization conducts business activities on a regular basis and those activities are not substantially related to the purposes for which the organization was granted tax exempt status (i.e., the unrelated business income tax or “UBIT” rules), that organization is subject to taxation on its net return and, if those activities are substantial, is at risk of losing tax exemption altogether. Application of the UBIT rules turn on whether the tax exempt nonprofit organization’s activity is consistent with, or substantially related to, its tax exempt nonprofit purposes. Thus the Commission should be comfortable in interpreting the unsolicited facsimile rule as not applicable to tax exempt nonprofit organizations when, and to the extent that, they are pursuing their tax exempt nonprofit purposes.

As noted, facsimile communications by tax exempt nonprofit organizations to their constituencies simply are not “advertising the commercial availability or quality of any property, goods, or services” and thus should not be covered by the Commission’s rule. Note, for example:

- A medical society’s notice to dues-paying physician members reminding them to register for the society’s annual meeting;
- A national health-related charity’s letter seeking participation and registration in a upcoming fund-raising event;
- A seniors’ organization flyer offering subscriptions to publications addressing independent senior living;
- A trade association’s release about a new book title on the latest business challenges to members;



- A university alumni organization's promotional piece on the availability of a networking directory of alumni; or
- An advocacy organization's request for contributions supporting the organization's public policy causes.

These and similar facsimile communications by tax exempt nonprofit organizations must not be affected by the purview of the new rule. They serve enormously valuable and largely essential societal purposes that have been recognized and authorized by federal and state governments through tax exempt and nonprofit status.

ASAE recognizes, however, that the TCPA prohibition on unsolicited facsimile advertisements may apply to some tax exempt nonprofit organization unsolicited facsimile transmissions. If such an organization were to direct a facsimile communication to constituents, either directly or through a for-profit taxable business subsidiary, that is not in furtherance of the organization's tax exempt nonprofit purposes under federal tax exemption or state nonprofit requirements, then the statutory prohibition on unsolicited facsimile advertisements would apply. This distinction can be easily stipulated, and readily enforced, if the Commission were to merely interpret the prohibition as not applicable to tax exempt nonprofit organizations when pursuing their tax exempt nonprofit purposes.

### **Emergency Relief**

ASAE seeks an emergency clarification of a crucial issue not substantively addressed in the Commission's new rule – the applicability of the rule to tax exempt nonprofit organizations' facsimile transmissions constituents. In determining whether emergency relief is warranted, the courts and the Commission consider: (1) whether the petitioner will suffer irreparable harm if emergency relief is not granted; (2) whether the petitioner is likely to prevail on the merits; (3)

whether any other interested parties would be substantially harmed if the relief is granted; and (4) whether the public interest favors the relief.<sup>13</sup> Under this standard, ASAE's request for emergency clarification should be granted. Failure by the Commission to grant the petition for emergency clarification will result in untold interruption and curtailment of communications by tens of thousands of tax exempt nonprofit organizations with their constituents. There are compelling arguments both in the law and in equity that dictate in favor ASAE's petition. The Commission's rule simply does not address the issue of the petition; and the controlling statute refers to "commercial" advertising which is not pertinent to tax exempt nonprofit organizations. No other parties would be harmed by the emergency clarification. Indeed, constituents of tax exempt nonprofit organizations would be severely harmed if the clarification were not issued. Public interest also strongly favors the emergency relief. Tax exempt nonprofit organizations are by definition operating under legal mandates to serve the public interest; disruption of their communications to constituents can only harm the organizations and their public interest causes.

### **Conclusion**

ASAE respectfully urges the Commission on an emergency basis to issue a clarification that facsimile communications by tax exempt nonprofit organizations conducted consistent with the organizations' tax exempt nonprofit purposes are non-commercial and are not covered by the

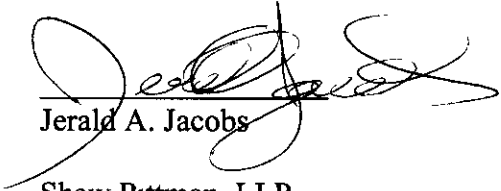
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<sup>13</sup> See, e.g., Washington Metropolitan Area Transit Authority v Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Larouche v Kezer, 20 F.3d 68, 72 (2d Cir. 1994); In the Matter of Bienniel Review – Amendment to Parts O, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket Nos. 98-20, 96-188, RM-8677, Memorandum Opinion and Order, FCC 99-129 [16 CR 270] (released June 9, 1999) at para. 4 (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

TCPA's statutory definition of "unsolicited advertisement."

Respectfully submitted,

By:

  
Jerald A. Jacobs

Shaw Pittman, LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000

Its Attorneys

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